United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2201 B

P/S

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 73-2201

LILLIAN WEISS,

Plaintiff-Appellant,

-against-

CHRYSLER MOTORS CORPORATION and
CHRYSLER CORPORATION,

Defendant-Appellee.

On Appeal from the United States District
Court for the Southern District of New York

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Chrysler's legal brief is notable for what it lacks - law. But Chrysler's strategy is clear. Inasmuch as the legal authorities, we submit, are overwhelmingly in plaintiff's favor, Chrysler has abandoned any attempt to make a studied legal response to the arguments presented in plaintiff's main brief. Rather, Chrysler would hope to mire this appeal in a morass of seemingly contradictory factual disputes, thus attempting to divert attention from the clear legal principles involved; i.e., the deprivation of plaintiff's fundamental right of rebuttal, and the vitiation of her equally fundamental right of cross-examination by means of frustrating the discovery process.

We are sorely tempted to entirely ignore the factual disputes which Chrysler has raised, thereby derailing its diversionary strategy. Most of these disputes are picayune; all are irrelevant to this appeal. But what is most inexcusable about Chrysler's tactics is the fact that its brief contains many factual misrepresentations, supported by miscitations and highly selective quotations

from the record. Thus, we fear that the overall effect of Chrysler's factual assertions, if left unrebutted, would be to create the impression that a verdict in plaintiff's favor would have run counter to the weight of the credible evidence. This most certainly was not the case, and we will therefore have to treat some of these factual misrepresentations.

However, we will not disturb the true focus of this appeal. Thus, the overriding task of this reply brief will be to concentrate on the clear legal issues that Chrysler has attempted to obfuscate. Most importantly, we submit to this Honorable Court that the result below, if affirmed, would tend to alter the now well-structured and economic framework of a trial. There would be great pressure to significantly extend cases in chief, for fear of losing the opportunity to rebut specific opposition evidence. Primarily for this reason, we submit to this Honorable Court that this appeal is of critical importance.

Initially, however, we are obliged to clear away some of the "smoke screen". It is clear from a reading of Chrysler's brief that the main thrust thereof is to concentrate on plaintiff's claim that she was surprised by the introduction of Mazur's "rim dent" theory. The claim, of course, is that plaintiff was surprised because this particular theory was concealed by Chrysler, in direct contravention of the federal discovery rules and Judge Griesa's pre-trial discovery order of February 7, 1973. Chrysler goes to great lengths to claim that plaintiff was not surprised. But what Chrysler fails to appreciate is that the presence of surprise, although an aggravating factor, is not in any way a necessary ingredient of the main legal errors assigned herein. This will be discussed in detail in Points I and II, below.

Moreover, Chrysler plays a misleading game with respect to this question of surprise. By improperly characterizing plaintiff's argument in this regard, Chrysler creates a vulnerable semantic "strawman", and then proceeds to "devastate" it in 72 pages of rambling rhetoric. Thus, on page 9 of Chrysler's brief,* plaintiff's argument is portrayed as follows:

> "The thrust of plaintiff's complaint on this appeal is that she was deprived of notice of Chrysler's tree-stump theory of impact prior to trial and was unaware of it throughout her case in chief, thus precluding her from attempting to negate this theory on her direct case. . . . [A]t no time did the defense adopt a specific theory as to which of the vehicle's series of impacts precipitated the failure of this stud" (emphasis added).

But the ruse will not work. Plaintiff never claimed to have been surprised by the stump as a source of some impact, or by the drainage ditch for that matter. What surprised plaintiff was that Chrysler had the audacity to claim, through its non-expert Mazur, that the rim dent on the right wheel (caused by whatever source of impact) produced sufficient force, not only to pull a tie rod stud out of its housing, but also, at the same moment in time, to fracture a properly manufactured Pitman arm stud. It was this fallacious "expert opinion", allegedly bottomed upon undisclosed tests performed by Chrysler's supplier, TRW, prior to trial, that surprised plaintiff; and we said this quite clearly at several places in plaintiff's main brief, (for example, pp. 35-36). Plaintiff could hardly have claimed surprise with respect to the existence of the stump and drainage ditch, inasmuch as it was her own expert, Moseley, whose thorough investigation disclosed that the vehicle had traversed both of these points in the terrain (see Pl's Main Br., pp.33, 45-46).

Thus, Chrysler's extnesive quotations of the State Court testimony of Moseley and O'Connell at pp. 12 to 14 of its brief, while constituting

*Reference to pages in Chrysler's brief pertain to the pagination utilized in the typewritten copies served and filed by Chrysler on November 25, 1974.

a clearly improper reference to material not contained in this record, is nonetheless a gigantic exercise in irrelevance. All that testimony demonstrates is that both Moseley and O'Connell were aware of the obvious facts that the right front wheel contacted the stump and the drainage ditch, and that this contact would have "increased" or "affected" the forces on the Pitman arm stud (if one assumes that the stud was still in one piece at the time). But where do they tell us that Mazur would one day say that it requires 4560 lbs to "fracture" a sound Pitman arm stud, and 4800 lbs to cause tie rod separation, and that the observable rim dent in Exhibit AX (36) would not merely "increase" or "affect" the forces on the Pitman arm stud, but would actually fracture it?

Furthermore, the cross-examination of Moseley and O'Connell at the State Court trial in 1968, which plaintiff's counsel did not attend (contrary to Chrysler's contention), could hardly have provided an accurate indicator of Chrysler's defense in this Federal action. After all, Chrysler had used the Elfers accident as a defense in the State action, but had abandoned it herein (Pl's Main Br., p.8). Plaintiff was entitled to believe, as she did, that the following declarations by Chrysler were the reliable indicators of its defense: (1) answer to interrogatory no. 52, that failure of the stud was due to impact with the tree (24-25); (2) Donald Gregory's deposition testimony that he had "no opinion" as to the cause of the stud fracture (101); and (3) representation by Chrysler's counsel on February 7, 1973, that some portion of the fracture occurred "prior to the accident of November 14" (65)(emphasis added).

There is another diversionary tactic which has been employed by Chrysler, both at trial and on this appeal, and we will briefly deal with that tactic at this juncture. By the use of several witnesses,

Chrysler created a non-issue of speeding. This represented a classical kind of illegitimate strategy, because Chrysler had not pleaded contributory negligence as an affirmative defense (8). A last-minute attempt by Chrysler on the eve of trial to amend its answer in order to plead this defense was rebuffed by the trial Court.

Of course, in a products liability case, there is serious doubt whether contributory negligence can ever be a defense, at least where the alleged negligent use (in this case speeding) could have been anticipated by the manufacturer. Ford Motor Co. v. Matthews, 291 So.2d 169 (Miss. 1974); Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943, 948 (Mo. Ct. App. 1970); Restatement, Torts 2d §402A, Comment n; Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk, 25 Vand. L. Rev. 93, 118 (1972).

Nonetheless, Chrysler called Herman Maraniss, Modesta Hillary (both passengers in the Weiss automobile), Emmy Lou Salembier and Robert Bunge, for the sole purpose of proving that the plaintiff had been speeding at the time of the accident. This was a poisonous piece of obfuscation by Chrysler, because in this manner it could create a simplistic, albeit bogus, issue in the midst of a complicated scientific case - an issue that the lay jurors could easily grasp, and as to which they would be sorely tempted to accord great weight in light of the highly technical and often complicated nature of the real case. Of course, the plaintiff categorically denied that she had been speeding at the time of the accident (138) and testified that the accident was wholly caused by the sudden failure of the steering mechanism (139-40, 151; 174; 247-48). Additionally, cross-examination of these "speeding" witnesses demonstrated many deficiencies in their testimony. In this regard, see Salembier (1056-57),

Bunge (1061-62) and Maraniss (1063-66, 1071, 1073-74, 1076-80).

Undaunted by the law which prevails in this case, Chrysler, on this appeal, has continued its strategy of attempting to divert the focus of the inquiry to the allegations of speeding (e.g., Chrysler's brief, pp. 5-9). What makes this strategy by Chrysler so reprehensible is the fact that the "speeding" testimony is entirely irrelevant unless Chrysler can somehow prove that speeding was the only cause of the accident, thereby negativing the possibility that a product defect played any contributory role whatsoever. The trial Court did properly instruct the jury that speeding was irrelevant if a steering failure also occurred (1173-74). But, of course, the jury did not receive this instruction until after the evidence was in, and Chrysler's scheme, continued on this appeal, is clearly to cast the case as a "garden variety" automobile accident dispute, as if proof of driver speeding somehow would be an absolute bar to recovery.

The fact that driver "speeding" could not eliminate product defect as an issue in this case serves to illustrate just how important Professor Rader's rebuttal testimony was. His answer to Mazur's "rim dent" theory was based upon a simple and demonstrative laboratory test in which precision equipment had exactly measured the amount of force necessary to produce a dent in the wheel rim identical to the one shown in Exhibit AX (36). (See Pl's Main Br., p. 43). Rader's test was easy to understand and, we submit, would have had a devastating effect upon the credibility of Mazur's "rim dent" impact alternative to fatigue as the cause for the first stage of the now conceded two-stage Pitman arm stud fracture. Such a test would have drawn the jury back to its proper focus on the physical evidence. No one can say with certainty that Rader's rebuttal would have made the crucial difference, but, by the same token, no one can say that Rader's

testimony would not have made such a difference. That being so, we submit that reversal is required. Worcester v. Pure Torpedo Co., 127 F.2d 945, 947-48 (7th Cir. 1942).

In this context, one must remember why Mazur's theory was so crucial to Chrysler's defense. Despite Chrysler's efforts to suppress the conclusions of its own expert metallurgist, Mr. Donald Gregory, when Judge Griesa ultimately ruled, on December 11, 1972, that Chrysler had to divulge those conclusions (see Pl's Main Br., p.17), it became clear that Professor Robert Gordon's finding of a two-stage fracture was accurate. Gregory's memorandum of October 30, 1970 (Exhibit 149) contained the following admission:

> "The ridge running across the diameter is a major arrest point and shows that the fracture took place in at least two stages" (45) (Emphasis added).

Furthermore, it will be remembered that Exhibit 148, a compilation of notes made by Gregory while photographs were being taken by Thomas Turnbull, contained this devastating admission: "Part was running cracked (rounded edge)" (41) (emphasis added).

After Chrysler had been forced to disgorge Gregory's conclusions, Mazur's theory became absolutely essential to its defense. Professor Gordon had attributed the first stage of the fracture to fatigue, and unless Chrysler produced an alternative to fatigue as an explanation for the first stage of the fracture, the fatigue explanation would win the day. An impact-caused second stage would not save Chrysler, for plaintiff's experts agreed that this stage was indeed, caused by the impact stresses and strains of ordinary driving (Gordon, 582; Rader, 1089, 1158-60).

POINT I

CHRYSLER DOES NOT ANSWER PLAINTIFF'S ARGUMENT THAT RADER'S VITAL REBUTTAL TESTIMONY WAS ERRONEOUSLY EXCLUDED, AND THE "CRUCIALITY" OF THAT TESTIMONY IS EASILY ESTABLISHED.

Chrysler has made this appeal a much more simple matter by, in effect, conceding the validity of the authorities cited by plaintiff in support of her argument that Rader's rebuttal was erroneously excluded. Chrysler's answer to this argument is contained in its Point II. This Point is barely 5-1/2 pages long (Chrysler's Br., pp. 59-64), and incorporates no relevant law to speak of. Most significantly, it contains absolutely no treatment or discussion of plaintiff's cases which stand for the clear proposition that she had absolutely no duty, on her direct case, to anticipate and negate Chrysler's defenses. Throckmorton v. Holt, 180 U.S. 552, 564 (1901), National Surety Corporation v. Heinbokel, 154 F.2d 266, 268-69 (3rd Cir. 1946), and Lord & Taylor v. Yale & Towne Mfg. Co., 230 N.Y. 132, 140 (1920), are all precisely in point, and their meaning is clear: "We do not see that plaintiff was bound to anticipate defense proof. . . [on its direct case]." National Surety, 154 F.2d at 268.

Chrysler's only head-on response to the above authorities appears on page 59 of its brief:

> "We submit that the Trial Justice was correct in rejecting testimony offered in rebuttal that should have been offered in chief. Jones On Evidence, 3rd Edition, Section 809."

But this merely begs the question. The issue here is what should have been offered on plaintiff's case in chief, and the cases are clear that evidence which would negate possible defenses does not fall into this category. In fact, as was said in National Surety:

"We think the evidence could have been introduced in plaintiff's main case but as said in Schoen v. Elsasser, 315 Pa. 65 at page 68, 172 A. 301, 302: 'Where, however, evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal.' 26 R.C.L., §46, pages 1041, 1042; Stetson v. Croskey, 52 Pa. 230" (154 F.2d at 268)(emphasis added).

Chrysler avoids a discussion of plaintiff's cases for a very simple reason - these cases cannot be distinguished and there is, we submit, absolutely no contravening authority to be found. Rather, Chrysler proceeds by avoidance and detour, and concentrates on the minor issue of surprise, as if plaintiff were not entitled to rebut Mazur's theory unless its introduction had been completely unexpected. On page 59 of its brief, Chrysler characterizes plaintiff's argument as follows:

"Plaintiff erroneously argues that such testimony [Rader's] constituted proper rebuttal because of Chrysler's concealment of its stump impact theory until the testimony of Mazur on defendants' direct case."

This is not plaintiff's argument. Indeed, Mazur's "rim dent" theory did come as a complete surprise, as will be discussed further below. But let us assume, arguendo, that plaintiff knew all along of Chrysler's intention, through Mazur or someone else, to theorize that forces entering by way of the right wheel rim were sufficient to fracture a properly manufactured Pitman arm stud, whether that force was caused by the stump, the drainage ditch, or whatever. Such knowledge on plaintiff's part would be of absolutely no moment for the purposes of this appeal. Under the Federal Rules of Civil Procedure, it is crystal clear that surprise is not a necessary pre-requisite for the allowance of rebuttal. Even if Chrysler had provided absolute disclosure of Mazur's impact alternative to fatigue in its answers to plaintiff's interrogatories, plaintiff would have been entitled to await the presentation of that theory in open court before seeking to

negate it. This is made clear by the Advisory Committee Note of 1970 with respect to sub-section (b) of Rule 26, which reads, in relevant part, as follows:

> "The lawyer even with the help of its own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated." 4 Moore's Federal Practice ¶26.01 [18] p. 26-50 (emphasis added).

Thus, if pre-trial disclosure of expert opinion is necessary precisely for the purpose of preparing effective rebuttal, a fortiori, rebuttal is a proper and legitimate stage of the trial during which to negate such non-surprising pre-trial disclosures. (See also the other authorities cited at Pl's Main Br., p. 38).

On page 60 of Chrysler's brief, the following comment appears:

> "Plaintiff had an obligation on her case in chief to offer proof negating other possible causes for the Pitman stud fracture. Schunitz (sic) v. Macuse Lumbar & Trim Co. (sic), 29 A.D.2d 781, 287 N.Y.S.2d 706, aff'd, 24 N.Y.2d 856, 301 N.Y.S.2d 91 (1969); Ingersoll v. Liberty Bank of Buffalo, 278 N.Y. 1 (1959)." (Emphasis added).

Chrysler is confused. The above statement betrays a basic misunderstanding of evidentiary burdens, and the cases cited as authority therefor are not even relevant to the proposition advanced. A plaintiff begins a case with two burdens - the burden of coming forward with evidence on his direct case, and the ultimate burden of persuasion on the whole case with respect to the claims asserted. As to the latter burden, Ingersoll, the case inexplicably cited by Chrysler, holds as follows:

> "The plaintiff was not required to offer evidence which positively excluded every other possible cause of the accident. . . . It is enough that he shows facts and conditions from which the negligence of the

defendant and the causation of the accident by that negligence may be reasonably inferred." (278 N.Y. at 7).

Thus, even on the whole case, the plaintiff's burden of persuasion is substantially lighter than Chrysler would make it. Prosser, Law of Torts §44, pp. 222-23 (2nd ed. 1955).

The plaintiff's burden of persuasion on the whole case is especially light in a products liability litigation. (See cases cited at p. 54 Pl's Main Br.). Chrysler disagrees, and says so in its brief at the foot of page 60, but understandably cites no authority for its position.

However, what is vitally important for present purposes is the plaintiff's initial burden; i.e., the burden of coming forward with evidence. The plaintiff sustains this burden when he introduces enough evidence on his direct case to defeat a motion for a directed verdict; to wit:

> "The plaintiff asserts A, the defendant denies it, and the Persuasion-Burden is on the plaintiff. Ordinarily, if the plaintiff offered no proof of A, the Judge would nonsuit him or direct a verdict against him. Hence it may be said . . . that the plaintiff is 'overwhelmed' at the moment when the trial commences, and the Production-Burden is upon him. He is, therefore, bound to go forward with his evidence until he satisfies the Judge that the jury would be warranted in finding A. When the plaintiff has thus carried his Production-Burden, he is in the hands of the jury in the sense that if both parties rest at this point, the case will be submitted to the jury for decision." Field and Kaplan, Civil Procedure, p. 525 (1953).

Thus, there is no obligation to negative other possible causes on the plaintiff's direct case. Proof of defective manufacture, standing alone, would get the plaintiff to the jury at the close of plaintiff's case. In Schwartz, the other case cited by Chrysler, the plaintiff had not even met this initial burden (287 N.Y.S.2d at 707). The obligation of coming forward with evidence respecting other possible causes is never with the plaintiff on his direct case, but arises with the defendant at the close of plaintiff's direct case.

fhis proper allocation of the production burdens was recently confirmed by this Court in Krause v. Sud-Aviation, Soc. Nationale De Constr. Aero., 413 F.2d 428 (2d Cir. 1969).

Krause involved a helicopter crash, in which the plaintiffs claimed defective manufacture. Judge Croake, in a non-jury decision, found for the plaintiffs, and the defendant appealed on the ground that the Court erroneously placed the ultimate burden of persuasion upon it rather than upon the plaintiff. But the defendant in Krause, like Chrysler herein, failed to distinguish between the persuasion-burden and the production-burden, and thereby improperly analyzed Judge Croake's decision. It was only the burden of coming forward with evidence as to causes other than a defective manufacturing weld that Judge Croake placed upon the defendant, and properly so. As Chief Judge Lumbard explained it:

> "We think. . . that the opinion read as a whole makes it sufficiently clear that the court accepted libelant's insufficient root penetration explanation, together with the fact that the failure occurred during normal operating conditions, as establishing that the weld was defective and that this probably caused the crash. This placed upon SUD a burden of going forward with evidence of another possible cause; the rejection of SUD's evidence left the failure of the defective part as the cause. In short, we think the court left the ultimate burden of persuasion on the libelants . . . ." (413 F.2d at 431)(emphasis added).

In the same fashion, once plaintiff herein had put in her evidence that fatigue was the cause of the first-stage of the fracture, the burden of coming forward with evidence as to other possible causes shifted to Chrysler. Plaintiff had no obligation to present negative evidence with respect to an impact cause on her direct case; her burden to come forward with that sort of evidence only arose on rebuttal, once it became clear what, if any, alternative explanation Chrysler was actually selecting. This is the rationale which underlines

Throckmorton, National Surety, and Lord & Taylor (all cited above), which clearly hold that a plaintiff has no duty to anticipate defenses on his direct case, and may await the rebuttal stage to present negative evidence as to these defenses.

And, of course, this has to be the law. If plaintiff herein had attempted, on her direct case, to negate a hypothetical defense based upon some specific source of impact prior to the vehicle's ultimate collision with the tree, what was to prevent Chrysler from selecting an explanation based on some other source of impact? Mazur certainly demonstrated his ability to testify to anything that was required. And Chrysler had preserved its ability to shift ground easily, inasmuch as it had skillfully avoided answering plaintiff's interrogatories as to causation. Thus, Chrysler was not tied down to any specific explanation as to the first stage of the two-stage fracture. A good example of Chrysler's ability and willingness to shift ground is provided by its treatment of the Elfers' accident. Whereas in the related State Court litigation Chrysler had attempted to attribute causation to the Elfers' incident, this defense was abandoned through the mouth of Mazur (745-48) after Mr. Stephen Richard had convincingly testified that an originally sound and properly manufactured Pitman arm stud could not possibly have been fractured by the impact sustained in the Elfers' collision (698).

On pages 42 and 63 of its brief, Chrysler states that Rader's rebuttal testimony was properly excluded because "it concerned an issue which was first raised on plaintiff's direct case." What Chrysler has in mind here is Moseley's cross-examination testimony quoted on page 17 of its brief, which testimony we set forth in greater detail on page 46 of plaintiff's main brief.

It is certainly true that Chrysler accurately states Judge Griesa's rationale for excluding Rader's testimony, but this rationale is, we submit, no less erroneous when stated by Chrysler than when it was first pronounced by Judge Griesa. As we have already pointed out in some detail at pages 46 through 48 of plaintiff's main brief, Moseley was not talking about a possible fracture of the Pitman arm stud, as Mazur was. Moseley was merely postulating a possible failure of that stud by reason of its being pulled out of its housing through an application of the same forces that pulled out the tie rod stud.

Oddly enough, even though the trial Court excluded Rader's testimony on the basis that Moseley had testified as to a fracture of the Pitman arm stud (Pl's Main Br., p. 44), 13 days earlier, during the cross-examination of Mr. Richard, the Court demonstrated a clear understanding of the distinction between "fracture" and "pulling out". With respect to Moseley's testimony, the Court stated:

> "My understanding is that he [Moseley] told you that he would not expect it to be - would not expect the pin to be broken, he would expect that it would be pulled . . . . [B]ut you asked Mr. Moseley about a failure, and Mr. Moseley had this - . . . . Failure can mean two things." (690-91)(emphasis added).

Chrysler misrepresents the facts when it contends that the testimony of Moseley upon which it relies arose during plaintiff's direct case. That testimony was elicited during cross-examination. Assuming, for the moment, that Moseley and Mazur were talking about the same thing, the very fact that plaintiff would later seek to rebut Mazur's theory indicates that plaintiff hardly espoused his theory. It is simply not logical to characterize Moseley's cross-examination testimony as being part of plaintiff's direct case. This was the point made by Stanley v. Beckham, 153 F. 152, 154 (8th Cir. 1907):

"And it is immaterial that upon prior cross-examination the plaintiff had been interrogated respecting some particular phases of the conversation, for, as it had not been made, and was not necessarily, part of his case in chief, he was entitled in rebuttal to give his version of it and to go into every phase of it having any tendency to show that the defendant's version was not the correct one."

Where is Chrysler's answer to Stanley? Its brief is strangely silent on this point. Furthermore, as we pointed out on pages 48 and 49 of plaintiff's main brief, even if Moseley's testimony could be construed as giving rise to an inference that the rim dent was evidence of sufficient force to fracture a sound Pitman arm stud, plaintiff should have been allowed to introduce Professor Rader's rebuttal testimony precisely because such an adverse inference arose on her own case in chief. Patton v. Baltimore & O. R. Co., 120 F. Supp. 659, 664 (W. D. Pa. 1953), aff'd, 214 F.2d 129 (3rd Cir. 1954). Where is Chrysler's answer to Patton? Again, nothing but silence.

When one focuses upon the role of good and proper cross-examination, it becomes obvious, we submit, that the grounds for the exclusion of Rader's rebuttal were without foundation in logic. After the plaintiff's expert has rendered his opinion as to the likely cause of an occurrence, an effective cross-examiner will invariably elicit the admission from that witness that a whole host of different explanations are "possible", depending upon the circumstances and this or that. If it were now the obligation of the plaintiff's attorney to chase down all of these other explanations, adverse inferences, or other "butterflies" arising during cross-examination, either during re-direct examination or elsewhere on the plaintiff's direct case, the principle of judicial economy would be poorly served. It is not only fair, but also consistent with the expeditious disposition of litigation, to permit the plaintiff to await the full and specific exposition, on

the defendant's direct case, of those facts and opinions upon which the defendant really intends to rely. In this way, the scope of plaintiff's rebuttal is narrowed and well-focused.

The suggestion on pages 43 and 63 of Chrysler's brief that Rader's rebuttal testimony should have come in on the plaintiff's direct case is absurd for another reason. Rader's proferred testimony was derived from the results of his laboratory experiments, and was tailored precisely to rebut Mazur's theories, figures and calculations. Thus, because of the very nature of Rader's testimony, it could not possibly have been presented until Mazur's statements and numbers were available for study and the preparation of rebuttal.

On page 62 of Chrysler's brief, we have unexpectedly encountered the assertion that plaintiff's claim of reversible error is precluded by a failure to make an offer of proof. We seriously suggest that Chrysler's counsel consult the record. It begins in this regard with the assumption that Professor Rader was asked to make by plaintiff's counsel:

> "There has been testimony, I want you to assume, Professor Rader, with respect to Exhibit 47 in evidence [also Exhibit AX] of a wheel rim; that the dent or deformation shown in this wheel rim was of a - that if the wheel rim received the type of force on the right side that would cause this degree of deformation to the right wheel rim, that degree of force would be competent to cause a fracture of a sound Pitman arm pin in the car"(1113-14).

When Judge Griesa prevented Professor Rader from proceeding any further in this area, plaintiff's counsel made the following statements at a side bar conference:

> "THE COURT: Just indicate specifically what in the defense case you want to drive at.
>
> "MR. FRIEDMAN: Mr. Mazur, your Honor, as I understand the trial record, was the first person to introduce the contention that the deformation - the force that would

so deform a wheel rim would be a force that would fracture a Pitman arm pin and what it came from Mr. Mazur in the case (1114).

* * *

"MR. FRIEDMAN: It is a test that has been made by people who don't ship things from Schenectady to Detroit, by people who don't take photographs and who bring in their laboratory tests, that the force that would so deform the wheel rim would by no means fracture an arm pin (1116).

* * *

"THE COURT: You are wasting time.

"MR. FRIEDMAN: No. We have sitting right there a wheel rim that has been thoroughly tested and it shows that the force that would deform the wheel rim is known to the order of one-fourth of what would be required.

"THE COURT: No. I understand your offer of proof. I will not permit it under any circumstances in the case. Go to the next subject" (1117)(emphasis added).

Thus, with respect to Professor Rader's laboratory experiment, plaintiff's counsel certainly made it clear what it was that he proposed to demonstrate. The trial Court indicated that it definitely understood the offer of proof. If Chrysler means to contend that the offer of proof should have been laid out in more specific detail, that is an argument of no consequence. As was said in Maguire v. Federal Crop Ins. Corp., 181 F.2d 320, 321-22 (5th Cir. 1950):

> "The failure of the plaintiff to make an offer in evidence of the excluded testimony, as required by Rule 43(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is not fatal to her case. An offer of proof as to excluded evidence is not essential if it is otherwise entirely clear what the alleged error is. The question, as propounded by the plaintiff to her witness, was as to the differences between the land in question and the adjacent land. Such testimony as the plaintiff attempted to elicit from her witnesses would have served to rebut the comparative evidence of the two farms offered by the defendant, and should have been admitted. Evidence in rebuttal is admissible to repel, explain, disprove, or contradict, facts given in evidence by the adverse party." (emphasis added).

To the same effect is Meaney v. United States, 112 F.2d 538, 539 (2nd Cir. 1940).

Of course, Professor Rader's rim dent experiment would only have formed the beginning of his testimony in rebuttal. He proposed to demonstrate, for the reasons advanced at pages 39-40 of plaintiff's main brief, that Mazur's premise of 4,560 pounds as sufficient to fracture a sound Pitman arm stud was utterly fallacious. Furthermore, based upon the results of his laboratory experiment, Professor Rader would have devasted Mazur's theory that the force necessary to effect the left tie rod separation would have been sufficient to fracture a properly manufactured Pitman arm stud. The reasoning which underlies this necessary conclusion, together with the other aspects of Professor Rader's proposed testimony, will be set forth in greater detail below.

However, for present purposes it is important to note that the lack of greater specificity in plaintiff's offer of proof was not the fault of plaintiff's counsel. As set forth above, it was the trial Court which cut off a further description of plaintiff's offer with the comment that "I understand your offer of proof." This precipitate action by the trial Court constitutes, in and of itself, further grounds for reversal herein. In Pennsylvania Lumbermans Mut. Fire Ins. Co. v. Nicholas, 253 F.2d 504 (5th Cir. 1958), the defendant insurance company appealed from a judgment below which granted plaintiff recovery on account of a fire loss to plaintiff's goods and merchandise. The defendant appealed on the grounds that certain evidence had been erroneously excluded by the trial Court, including the following:

> "[Defendant] also sought to prove the amount of sales made out of the salvage and the amount of goods transferred into new stock. The Trial Court excluded this evidence and on several occasions prevented appellants from completing their proffer of proof" (253 F.2d at 505)(emphasis added).

The Court of Appeals reversed, holding, among other things, as follows:

> "Appellants also complain of the refusal of the Trial Court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course any evidence they wish to tender that would tend to establish these defenses should be received by the Court, and as to any which the Court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement of what they intend to prove in order that the appellate courts can intelligently pass upon the challenged ruling of the trial court" (253 F.2d at 506-7)(emphasis added).

We submit that Judge Griesa's action in cutting off plaintiff's further offer of proof, insofar as that action has prejudiced this Court's review of Professor Rader's proposed testimony, constitutes an additional ground for reversal and the grant of a new trial.

On page 41 of its brief, Chrysler claims that Professor Rader testified "notwithstanding plaintiff's pre-trial stipulation to call only Moseley, Gordon and O'Connell as experts . . . ." This is misleading. Judge Griesa noted that pre-trial memoranda were never exchanged in this case which bound both sides to any particular experts (607).

In addition to the reasons discussed above, Chrysler also claims that the trial Court excluded Professor Rader's testimony because "it did not speak to any new facts raised by Chrysler's defense." (Chrysler's brief, p. 43). The trial Court never used this rationale to support its ruling, and Chrysler never objected to Rader's proffered testimony on this basis. It should be noted that Chrysler cannot support its contention here with any citation to the record.

Most importantly, Chrysler's argument in this regard, when analyzed, demonstrably lacks any foundation in fact or logic. Simply put, Chrysler contends that Rader would not have rebutted Mazur.

There are two aspects to Chrysler's argument: (1) Rader used a "different standard of measurement" from the one employed by Mazur, and (2) Mazur's opinion was premised upon the fact of the left tie rod separation and Rader's opinion was premised upon the force necessary to produce the observed rim dent. Both aspects of this argument are equally erroneous - we will begin by dealing with the first one.

On page 62 of its brief, Chrysler makes the following statement:

> "Additionally, Radar (sic) uses a different standard of measurement, to wit, pounds of pressure per square inch (psi) whereas pounds (lbs.) was the measurement used by Mazur during his testimony. Clearly, the proposed testimony of Rader could not have served to rebut Mazur's testimony since two totally different types of measurement were used."

The only thing that is "clearly" demonstrated by the above argument is that Chrysler's counsel has not brushed up on his introductory science. Indeed, Mazur talked in terms of pounds (4560 lbs.) necessary to "fail" a sound Pitman arm stud. Professor Rader would have testified that it required 48,000 pounds per square inch to fracture a sound Pitman arm stud, and that the force necessary to create the observable rim dent shown in Exhibit AX(36), when transmitted to the site of the Pitman arm stud, would equal 13,333 pounds per square inch (Pl's Main Br., p. 43). The forces necessary to fracture the stud and dent the rim could have been described in terms of any meaningful standard of measurement. There was no need to adopt Mazur's language. What mattered was that Rader's experiment was internally consistent and he applied the same standard of measurement both to the rim dent force and to the Pitman arm stud fracture force. However that force was measured or described, in terms of the physical result produced, it would come out the same every time; i.e., the amount of force necessary to produce the rim dent would be less than 1/3 of what

was required to fracture a sound Pitman arm stud. Thus, it was the ratio of 1/3 that rebutted Mazur, not the means of measurement.

As a matter of actual fact, Professor Rader would never have spoken in terms of absolute pounds, as Mazur did. In this sense, we are indebted to Chrysler for raising this point in its brief, for it merely demonstrates another aspect of Mazur's incompetence. When talking about the force necessary to fracture (by shearing or otherwise) solids, or even to bend solids, the description of that force in terms of absolute pounds is meaningless. As those who have studied elementary science know, the force has to be translated into force per area (e.g., pounds per square inch) when analyzing the deformability of solids, because one must know to what extent that force will be concentrated or diffused. Obviously, if Mazur's 4,560 pounds was applied per square mile, that force would have a miniscule effect on a square inch of solid, and when dealing with a Pitman arm stud, we are talking about areas in the neighborhood of portions of a square inch. But, of course, Mazur never did receive any college training, so he could hardly be expected to know this. See Sears and Zemansky, College Physics, p. 206 (3rd Ed. 1960). If Professor Rader had been allowed to testify in this area, he would have pointed out this alarming deficit in Mazur's theory.

The second aspect of Chrysler's argument, mentioned above, is even more absurd. On page 44 of its brief, Chrysler maintains that the "cruciality" of Rader's proposed rebuttal "dissipates upon an accurate analysis of Mazur's testimony." Chrysler goes on to state that:

> "Mazur's impact theory was based upon the fact that a greater force is necessary to cause a tie rod separation than is necessary to fracture the Pitman stud. The amount of force necessary to cause the deformation of the wheel flange, the subject of Radar's(sic) experiment, is irrelevant. . . ." (Chrysler's brief, p. 63)(emphasis added).

In the first place, it should be noted that Chrysler's characterization of Mazur's impact theory is incomplete and misleading. On March 8, 1973, before Mazur had even mentioned the subject of tie rod separation, he visually assessed the degree of deformation in the right wheel rim (Exhibit AX) and, on that basis alone, categorically pronounced it sufficient to fracture a sound Pitman arm stud (750). Mazur did not discuss the force necessary to cause a tie rod separation until March 9 and his opinion of March 8, quoted at page 34 of plaintiff's main brief, was not in any way linked to the fact of tie rod separation.

In point of fact, Professor Rader's proposed testimony would have been right on target with respect to Mazur's tie rod separation theory. Mazur's theory starts with his premise that it requires 4,560 pounds to "fail" a sound Pitman arm stud (745-46). Of course, as we have pointed out above, the measurement of "pounds" is meaningless in this respect. Further, as we demonstrated at some length on page 40 of plaintiff's main brief, Mazur's figure of 4,560 pounds related to bending and not to fracture. (746-47). We should point out at this juncture, that if Professor Rader had been allowed to testify in this area he would have quite adequately pointed out these very deficiencies.

Mazur's figure of 4,560 pounds was presented in Court on March 8. On March 9, Mazur stated that "regularly run" TRW tests have demonstrated that it requires between 4,800 pounds and 10,360 pounds to pry or pull out a tie rod stud from its housing (764).

Moseley had testified that the left tie rod stud had become separated from its housing when the right front wheel contacted the stump and exerted a pull on the entire steering linkage (420). Of course, Moseley also testified that this tie rod separation would

never have occurred if the wheels had not been in a severe right configuration precisely because the Pitman arm stud had already fractured across. (See Pl's Main Br., p. 45). But putting this to the side for one moment, and assuming, therefore, that the Pitman arm stud was still sound when the right front wheel contacted whatever object it is that Chrysler now wishes to contend caused the tie rod separation, then the "punch line" in Mazur's tie rod separation theory goes like this - it required a minimum of 4,800 pounds to effect the tie rod separation that admittedly occurred; ergo, the same impact event which separated the tie rod stud also fractured the Pitman arm stud, inasmuch as the latter task would require, according to Mazur, only 4,560 pounds. Now, says Chrysler, it is clear that Mazur's theory was premised upon the force necessary to effect tie rod separation. Since Professor Rader was dealing with the amount of force necessary to cause the observed rim dent, his proposed testimony was "irrelevant" and could not serve to rebut Mazur's theory (Chrysler's brief, p. 63).

This is simply a very specious argument. Chrysler now wants to concentrate on tie rod separation as the "corner stone" of its defense (ignoring Mazur's March 8 testimony based entirely upon the rim dent), but it makes no difference for these purposes. Chrysler is trying to deal with the tie rod separation and the rim dent as two separate events, unconnected in the chain of causation, and asserts that Mazur was dealing with one separate event while Rader proposed to treat the other.

But the physical connection between the two events cannot be so easily obliterated. Even Chrysler must concede that the right rim dent "established the place of entry" of (as Chrysler likes to put it) "gigantic forces" (Chrysler's brief, p. 44). Mazur started with the

force that came from the rim entry point, and concluded that this force would be sufficient to fracture a sound Pitman arm stud. His method of proof (on March 9) was to measure that force by focusing on the left tie rod separation. Professor Rader started with the same force entering through the same right wheel rim, and concluded that it would be less than one third of the force necessary to fracture a sound Pitman arm stud. Professor Rader's method of proof was to measure the identical force by focusing on and assessing the pounds per square inch necessary to produce the observable damage to the right wheel rim. Both Mazur and Professor Rader were measuring the same force caused by the same impact event.

Again, Chrysler is confused. It seems to believe that one theory cannot be rebutted by another because the methods of proof or argument differ. Thus, if Mazur had testified that the world was flat because he had observed it to be that way from a mountain top, Chrysler would not allow Rader to silence Mazur with proof that he, Rader, had flown an airplane in the same constant direction and arrived back at his starting spot. Chrysler would only allow Rader's testimony if he had observed something different from Mazur's mountain top. Enough said.

On page 62 of its brief, Chrysler says there is no contention on behalf of the plaintiff that Professor Rader's laboratory experiment would have rebutted Mazur's tie rod separation theory. The truth of the matter is, we simply did not have room in plaintiff's main brief to treat every one of the ways in which Professor Rader would have rebutted Mazur. In any event, if we failed to make the contention before, we now state it categorically: Professor Rader's proposed testimony would have demolished Mazur's tie rod separation theory, and this result would have flowed naturally and logically from Rader's precision laboratory experiment respecting the rim dent. The testimony

would have gone as follows: (1) The force generated by the impact that produced the rim dent was less than one third of the force required to fracture a sound Pitman arm stud, and (2) the tie rod was separated from its housing by the same forces which produced the rim dent. Ergo, Mazur's premise (that it takes more force to pry out a tie rod stud than it does to fracture a Pitman arm stud cleanly across) becomes patently absurd.

There is one more argument of Chrysler's respecting Professor Rader's rebuttal which we must meet before we leave the subject. On page 17 of its brief, Chrysler notes that:

> "Furthermore, during the direct examination of Mr. Moseley, plaintiff's counsel tried to establish evidence of steering failure prior to impact with the tree stump (2/27, p. 96)[304]. The record with respect to the foregoing belies plaintiff's claim on this appeal that she was surprised with defendants' tree-stump theory for the first time on defendants' direct case."

Chrysler's reasoning will not withstand analysis. Of course plaintiff's counsel was aware of the fact that the right front wheel had contacted the tree stump. And, through analysis of the skidmarks, Moseley did, in fact, establish that the steering failure had occurred prior to the tree stump (284-85, 301-4). But what Chrysler fails to tell this Court is that plaintiff, through Moseley's skidmark analysis, also established that the steering failure occurred prior to the drainage ditch and prior to the impact tree (341). Furthermore, by means of similar analysis, plaintiff also attempted, through Moseley, to demonstrate that the failure occurred considerably after the so-called "driveway hump" in Route 123 (358-60).

The point is this - precisely because of Chrysler's non-disclosure tactics, plaintiff had absolutely no idea where Chrysler would attempt to locate its crucial impact alternative to fatigue as an explanation

for the first stage of the conceded two stage fracture. Thus, through Moseley, whose only expertise was in the analysis of the skidmarks, plaintiff established that final and complete fracture had occurred either before or after various impact events which Chrysler might attempt to utilize in order to escape its two stage predicament.

Now does Chrysler mean to contend that, by noting that the ultimate steering failure occurred in an area between impact alternatives, plaintiff somehow revealed a foreknowledge of Mazur's specific rim dent and tie rod separation theories, bottomed, as they allegedly were, upon figures and calculations derived from regularly run TRW tests? This is absurd. How could plaintiff possibly have known of Mazur's "expert opinions" before they were disclosed? Therefore, how could Professor Rader's proposed testimony, precisely tailored to rebut Mazur's specious theories, possibly have been presented on plaintiff's direct case? Directly in point is Lord & Taylor v. Yale & Towne Mfg. Co., 230 N.Y. 132, 140 (1920), where the Court of Appeals stated:

> "Plaintiffs were not bound to anticipate that defendant would assert that in one of the several particulars alleged by them [the plaintiffs] to be improper the work was safely bolted. They had no opportunity to meet this bit of evidence until defendant produced it" (emphasis added).

In the same fashion, although Moseley talked about the impact tree, the drainage ditch, the stump, and the driveway hump, plaintiff had "no opportunity to meet" Mazur's "bit of evidence" until Chrysler produced it.

In summary, we feel it is important to reiterate the most crucial point which underlies this appeal. While a plaintiff does have the right, on rebuttal, to meet serious adverse inferences arising on cross-examination of plaintiff's witnesses (Patton, 120 F. Supp. at 664), even

though the defendant does not offer specific evidence as to such inference on its direct case, as a practical matter, a plaintiff cannot rightfully rebut each "possibility" inferred to in passing on cross-examination, if that is all that occurs. But once a defendant selects one of such "possibilities" and asserts on its case that such "possibility" was in fact an actual cause, then a very different circumstance is presented. For now, plaintiff's rebuttal proof is not being offered in explanation of some "possibility" uttered on cross-examination in plaintiff's case, but rather is in direct response to deliberate and explicit testimony presented by the defendant as part of and during its case.

Thus, when Chrysler elected, during its case, to mount and present an elaborate claim as to specific pounds of force, test results and alleged experience and opinion by Mazur as to the rim and tie rod theories, and having thereby pinpointed which "possibility" it now asserted was the actual cause, a right of the plaintiff to deal directly with that specific contention most certainly arose, and the time and manner of doing so necessarily was on the rebuttal case.

This rule does not unduly extend trials; it has precisely the opposite effect. Plaintiff is not required to extend the prima facie case by chasing down every "butterfly" possiblity released during cross-examination on the prima facie case. But when specific proof is offered, by defendant, plaintiff may zero in with rebuttal proof precisely on target with respect to that particular "butterfly".

Such a ruling is not only consistent with judicial economy and logic; with all due respect to the learned and devoted trial Court, it has been the time honored and standard operating procedure of our trial courts over the years. Plaintiff seeks no new rule here; merely the application of fairly familiar concepts unfortunately departed from, at a critical juncture, in this serious trial.

POINT II

THE TRIAL COURT'S ORDER OF FEBRUARY 7, 1973 AND PLAINTIFF'S INTERROGATORIES EXPLICITLY CALLED FOR A DISCLOSURE OF MAZUR'S FACTS, TESTS, CONCLUSIONS AND OPINIONs, AND BECAUSE OF CHRYSLER'S NON-DISCLOSURE, MAZUR'S TESTIMONY SHOULD HAVE BEEN EXCLUDED.

As we pointed out in plaintiff's main brief, the disallowance of Professor Rader's rebuttal, erroneous in and of itself, also served to compound the injustice that was done when Mazur was allowed to testify as to tests, conclusions, opinions, and other information, even though that information had not been disclosed pursuant to Judge Griesa's pre-trial order of February 7, 1973 (73-76). This order had been rendered in response to plaintiff's motion to strike the answer of Chrysler because of its failure to properly respond to plaintiff's interrogatories.

As it did with respect to the rebuttal point, Chrysler again places great reliance upon the issue of surprise. Its contention is that plaintiff knew all along that Mazur's theory would be presented as the crucial alternative to the fatigue explanation for the first stage of the fracture. This is simply not so, as has been pointed out above, but even if it were, such foreknowledge on plaintiff's part would not in any way lessen Chrysler's obligation to make full disclosure pursuant to the interrogatories and the pre-trial order of February 7, 1973. It is hornbook law that a party has a duty to respond to interrogatories, whether or not the requested information is already within the knowledge of the opposing party:

> "[A] distinction should not be drawn between facts within or without the knowledge of the examining party . . . . Parties are to be allowed interrogatories in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided in the trial and to eliminate all expense and difficulty that would be involved in the production of evidence and proof at the trial."

* * *

> "Inquiry as to matters within the party's own knowleged or of general public knowledge is valuable also for the purpose of tying down the adverse party or witness to a definite story and defining the issues." 4 Moore's, Federal Practice ¶26.59, pp. 26-219 to 26-220 (emphasis added).

Perhaps Chrysler's greatest distortion of the record occurs on page 54 of its brief, where it engages in a tortured attempt to explain away the applicability of the February 7, 1973 order to the information contained in Mazur's testimony. This particular misrepresentation goes as follows:

> "The Court, in replying to plaintiff's argument, suggested that maybe defendants 'should be precluded from offering any evidence on trial as to the fractures' (p. 11)[64]. Clearly, the Court was referring to proof of fractures occurring prior to the November 14, 1964 accident. Plaintiff thereafter twice indicated that her only real concern was with preclusion of proof regarding the Elfer's accident (pp. 11, 22)[64, 67]." (emphasis added).

Misrepresentation of this sort is simply not defensible. What plaintiff's counsel said at pages 11 (64) and 22 (67) of the February 7 transcript was that preclusion of proof regarding the Elfer's accident was the "very least" that should be granted in the way of relief. Chrysler goes on to claim, on page 54 of its brief, that "plaintiff never complained of defendant's answer to interrogatory #46." Again, there is no truth to Chrysler's statement. In order to set the record perfectly straight on this score, it is perhaps best to quote directly from the transcript of the February 7, 1973 hearing. It will then be clear that the plaintiff's concern, and the trial Court's mandate to Chrysler, related to all interrogatories, especially no. 46. It will also be clear that the Court was demanding production by Chrysler of information relating to any "incident" or "impact", on or before November 14, 1964, which Chrysler would rely upon in an attempt to disprove manufacturing defect. The relevant portions of the transcript

read as follows:

"THE COURT: . . . . But as far as the information, the information you will rely on, in arguing the lack of causation of any defect, you are going to say it was not caused by a defect, it was caused by some incident.

"MR. LEWIS: Impact. Some incident prior to.

"THE COURT: Whether it was Elfers or what. All right" (68)(emphasis added).

* * *

"THE COURT: . . . . They know the rules about trying to come forward with things that you have not disclosed in discovery; that is all laid out" (70)(emphasis added).

* * *

"THE COURT: Anyway you have an obligation to amend your answer, you understand that.

"MR. LEWIS: Absolutely. If we get any information.

"THE COURT: As far as the things that you pointed out, Mr. Profeta, the statements in that folder about prior fracture [Exhibits 148 and 149], that is not, strictly speaking, responsive to 3(b) and 3(c), because it does not specifically mention the Elfers accident. That raises a different problem. Regardless of whether it was Elfers or not, was there some other impact and fracture that Chrysler is going to rely on to eliminate the argument of a defective manufacture?

"MR. PROFETA: Precisely, your Honor.

"THE COURT: In a more general way, not tying it to Elfers.

"MR. LEWIS: I think the whole discovery here has indicated that we have such information and we are going to use it" (71)(emphasis added).

* * *

"THE COURT: . . . . As to the information you have about any prior fracture, do you have anything in addition to what has been disclosed in this folder [Exhibits 148 and 149] and the items that Mr. Profeta mentioned and what may have been disclosed in the deposition on Mr. Gregory? Do you have any more information?

"MR. LEWIS: I believe there are other expert reports. . . . " (72)(emphasis added).

* * *

"MR. PROFETA: Your honor, in our original interrogatory No. 46, which asks for all of the results and conclusions of all the tests made by Chrysler and is a continuing interrogatory broad enough to subsume all of the information - " (72)(emphasis added).

* * *

"THE COURT: All I can say is that there is no question that your interrogatories are continuing interrogatories. Right, Mr. Lewis? And if 46 needs amendment, it had better be amended . . . . But, aside from Gregory who has been deposed, if there are any changes with respect to the conclusions of other experts or any other additional experts that need to be referred to, then certainly Interrogatory 46's answer has to be amended" (73-74)(emphasis added). (See also portion of Court's order at 75, quoted at Pl's Main Br., pp. 25-26).

* * *

"THE COURT: So the motion to strike the answer is denied. I don't think there is any other action we have to take. I think there are certain guidelines we have laid out in the record, and I don't think there is any necessity for a formal order" (76)(emphasis added).

Perhaps plaintiff was derelict in not insisting upon a formal order. With such an order in the record, framed in concise and explicit terms, there could be no argument by Chrysler on this point.

In any event, several things should now be absolutely clear: "Regardless of whether it is Elfers or not" (71), Judge Griesa was insisting upon Chrysler's disclosure of any "impact" (71) or "incident" (68) "that Chrysler is going to rely on to eliminate the argument of a defective manufacture" (71). Further, Chrysler admitted that "we have such information and we are going to use it" (71).

Therefore, Chrysler's answer to interrogatory no. 52, among others, should certainly have been amended. That interrogatory asked for the "facts and opinions" as to which each of Chrysler's experts would testify, together with a "summary of the grounds for each opinion" (18). Chrysler's answer, insofar as it concerned Mazur, read as follows:

"Sylvester Mazur will testify, it is expected, regarding the manufacturing techniques, procedures and inspections by his employer, Thomson Ramow Wolldridge, in its capacity as manufacturer of the Pitman arm stud and related components of the suspension. More specified information as to Mr. Mazur's anticipated testimony is not known at the present time, although it is noted that he will also testify regarding matters covered in the deposition of Sylvester Mazur, conducted by the plaintiff in the within action on February 17, 1970." (24).

Of course, it is obvious that the answer has nothing to say about Mazur's impact-fracture theories. Further, when Mazur's deposition was taken, he had absolutely nothing to say about such impact-fracture theories (833).

By concealing Mazur's impact alternative to fatigue as an explanation of the first stage of the fracture, Chrysler deprived plaintiff of the advance notice so vital to the preparation of meaningful cross-examination and rebuttal when dealing with scientific testimony. (See Pl's Main Br., pp. 36-39).

The failure to amend answer no. 52 certainly was in direct violation of Judge Griesa's order of February 7, 1973, inasmuch as Mazur's testimony clearly constituted "some other impact and fracture that Chrysler is going to rely on to eliminate the argument of a defective manufacture" (71)(emphasis added).

Moreover, as we have already pointed out at some length, Mazur's theories were premised upon the results of regularly run TRW tests. As noted on page 35 of plaintiff's main brief, interrogatory no. 46 called for the results of all such tests, and Judge Griesa had specifically ordered this particular interrogatory to be amended so as to reflect any new "information" or "conclusions" (74-75).

On page 55 of its brief, Chrysler suggests that plaintiff is now claiming that the results of the so-called "cycle" test, which test was performed during the trial, should have been disclosed pursuant

to interrogatory no. 46. Plaintiff does not make this claim, inasmuch as the results of that test were not obtained prior to trial. Actually, this test was irrelevant and had no probative value.

Also on page 55 of its brief, Chrysler admits that Mazur testified as to the results of "some of the general tests performed by TRW Inc. during the course of its regular business operations. . . ." These tests were the ones which produced the figure of 4,560 pounds to "fail" (actually "bend") a Pitman arm stud, and the figure of 4,800 pounds as the minimum force necessary to pry out a tie rod stud. Chrysler does not deny that these tests were run prior to trial. But on page 55 of its brief, Chrysler makes the strained argument that the results of these tests were not called for by interrogatory no. 46, inasmuch as interrogatory no. 45 (to which no. 46 refers) asks whether any tests were conducted "in an attempt to ascertain the cause of the failure." (15-16).

However, Chrysler is cutting it much too fine. Does Chrysler mean to say that interrogatory no. 46 calls for the results of only those tests which had, as their sole purpose, the determination of the Pitman arm stud failure? This is a very convenient interpretation. Thus, says Chrysler, if a test is regularly run on the Pitman arm or tie rod studs, and the results of these tests were utilized in forming opinions and conclusions regarding the failure of the stud in the Weiss vehicle, nonetheless, the results of these tests need not be disclosed because they are also utilized for general business purposes.

This argument simply will not wash. We submit that it is entirely clear that interrogatory no. 46 calls for all test information relied upon in any "study" made "to determine the cause of the failure". Furthermore, sub-section (e) of interrogatory no. 46 asks for "the nature and substance of all information which was made available to

the person conducting the study with respect to the item and the circumstances of its failure." (16). It is plain that TRW's regular tests constituted "information" which Mazur availed himself of in the course of his study. Sub-section (j) asks for the "results and conclusions" of each such study (16), and here is where plaintiff should have learned the full details of Mazur's impact-fracture theories, together with their premises.

On page 35 of its brief, Chrysler makes the following claim:

> "In addition, as will be more fully discussed in Point I of this brief, plaintiff's counsel never objected to introduction of the results of the TRW Pitman arm stud test, on the grounds of surprise or failure to include same in Chrysler's answers to plaintiff's interrogatories."

However, when we come to page 56 in Point I of Chrysler's brief, where the "lack of objection" is supposedly "more fully discussed", we find that Chrysler has quoted a truncated portion of counsel's objection, that, ironically, even as it is quoted, makes it clear that plaintiff's counsel did object to Mazur's testimony on the grounds that the relevant interrogatories had not been amended and up-dated. Counsel's objection, in its entirety, reads as follows:

> "Mr. Mazur has testified on direct about a 19,000 cycle test. It is now disclosed that he did not participate in the test, did not conduct it. It is rank hearsay from a Mr. Don Parrott, and all of his testimony in that regard should be stricken. This is not even reaching the traditional direction by this Court that the interrogatories be up-dated and, of course, there is an outstanding interrogatory as to any tests, any experiments that were conducted and reports - that is interrogatory, I think 46 - that is of long standing. We were never served with any kind of up-dated information as to them conducting tests. But without reaching that necessarily as to the pre-trial discovery aspect it's plain hearsay from this man and is totally inadmissible" (865)(emphasis added).

Chrysler's argument must go as follows: by objecting to the admissibility of testimony for reasons 1 and 2, and then announcing that the testimony is inadmissible for reason 2 alone without ever

reaching reason 1, a party somehow waives his objection on the grounds of reason 1. This makes no sense at all.

Chrysler accuses plaintiff of misrepresentation with respect to the testimony of Mr. Donald Parrott. But is it Chrysler which is doing the misrepresenting, for it does not tell this Court that when Parrott did appear and testify, he had nothing at all to say with respect to the "regularly run" TRW Pitman arm stud bending test and tie rod prying test. The only thing Parrott testified to was the so-called "cycle" test, referred to on page 30 of Chrysler's brief. Thus, Mazur's hearsay remained the only testimony as to the critical bending and prying tests.

On February 7, 1973, Judge Griesa said "They know the rules about trying to come forward with things that you have not disclosed in discovery" (70). But when Chrysler did so come forward with Mazur's undisclosed testimony, Judge Griesa refused to exclude it. This, we submit was error, an error that was later terribly compounded by the exclusion of Professor Rader's rebuttal - and nothing in Chrysler's brief has changed that.

The limitations of space prevent us from adequately dealing with many, if not most, of the factual misrepresentations contained in Chrysler's brief. Some are very serious. On page 26 of its brief, Chrysler states that Professor Gordon found no evidence of defect in the stud, omitting to tell this Court that Gordon found the stud's outer hardness (or "case") to be 56 on the "Rockwell C" scale (570), and that Mazur later testified that sample studs are rejected unless they attain a hardness of 65 (827-28; 852-57). Moseley's skidmark analysis is attacked on page 19 with the absolutely ludicrous argument that steering failure would have produced identical skidmarks for the left and right front tires - one need only glance at Exhibit 159 (48)

to see that the right wheels were in the dirt at the time the left wheels laid down their marks! And we could go on and on.

CONCLUSION

As we view it, plaintiff has advanced three reasons, sufficient in and of themselves, to warrant reversal. But Chrysler's strategic non-disclosure, and the disallowance of plaintiff's right to confront Chrysler's expert with damaging admissions, also served to critically exacerbate the most serious damage done below; i.e., the exclusion of Professor Rader's precision laboratory experiment.

Certainly those experienced with day-to-day jury trial litigation and cross-examination therein of medical, engineering and similar experts recognize the hackneyed but constant lawyers' device of extracting a catalogue of other "possibilities" from the opposing side's expert. Is it now to be the rule that a plaintiff presenting that expert must "capture" every released "butterfly" before he may rest his case, rather than await the rebuttal case to deal with, if necessary, such contrary "possibility" as to which the defendant presents specific factual or expert proof? If such anticipatory elimination of possibilities must be completed on the direct case, or counsel forever forego the opportunity to rebut the theory defendant does come forward on, every plaintiff's direct case would be near endless. Such procedure has never been the rule, and both pragmatically and logically should not now become the rule.

For all of the reasons mentioned above and in plaintiff's main brief, we submit that plaintiff is entitled to a remand and a new trial.

Respectfully submitted,

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